Supreme Court, U.S.
FILED
FEB 1 - 2008
OFFICE OF THE CLERK

83

No. 07-1017

In the Supreme Court of the United States

CASTLE ROCK ESTATES, LLC,
Petitioner,
v.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNHIP OF WEST MILFORD, THE GOVERNING BODY OF TOWNSHIP OF WEST MILFORD, THE PLANNING BOARD OF THE TOWNSHIP OF WEST MILFORD AND JOHN DOES I THROUGH V, PERSONS AND/OR ENTITIES WHO COOPERATED, AND/OR PARTICIPATED IN THE WRONGS ALLEGED HEREIN BUT ARE AS YET UNIDENTIFIED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

LOUIS L. D'ARMINIO, ESQ.
Counsel of Record
ELLIOTT LOUIS PELL, ESQ.
PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.
MACK-CALI CORPORATE CENTER
50 TICE BOULEVARD
WOODCLIFF LAKE, NJ 07677
(201) 391-3737
Counsel for Petitioner

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

QUESTIONS PRESENTED FOR REVIEW

1. Does N.J.S.A. 13:20-35(d) violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it authorizes the assessment of serious, coercive civil penalties prior to administrative review in violation of *Thunder Basin Cool Co. v. Reich*, 510 U.S. 200, 114 S.Ct. 771 (1994)?

2. Does N.J.S.A. 13:20-35(d) violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it authorizes the levy on serious, coercive civil penalties prior to judicial review?

3. Did the New Jersey Courts violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by totally depriving Petitioner of discovery on its as applied claims for relief?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Cited Authorities iii

List of All Parties 1

Corporate Disclosure of Statement Pursuant to Supreme Court Rule 29.6 1

Statement of the Basis for Jurisdiction 1

Constitutional Provisions and Statutes Involved ... 1

Statement of the Case 4

Argument 5

Conclusion 9

Appendix

Order Denying Certification A-1

Notice of Petition of Certification A-3

Opinion A-5

TABLE OF CITED AUTHORITIES

Page

Constitutional Provisions

U.S. Const., Amend XIV 1

Case Law

Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780 (1971) 9

Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862 (1972) 8,9

Logan v. Zimmerman, 455 U.S. 422, 102 S.Ct. 1148 (1982) 8,9

Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975) 9

Thunder Basin Cool Co. v. Reich, 510 U.S. 200, 114 S.Ct. 771 (1994) 5,7

Statutory Provisions

N.J.S.A. 13:20-1, *et seq.* 4

N.J.S.A. 13:20-35(d) 1,2,5,6,7

N.J.S.A. 13:20-35(b)(5) 7

N.J.S.A. 13:20-35(d)(4) 7

28 U.S.C. 1257(a) 1

LIST OF ALL PARTIES

The caption of this case contains the names of all the parties, pursuant to Supreme Court Rule 14(b).

Corporate Disclosure of Statement Pursuant to Supreme Court Rule 29.6

Petitioner Castle Rock Estates LLC is a limited liability company.

There is no parent or publicly-held company owning 10% or more of the units of Castle Rock Estates LLC.

Statement of the Basis for Jurisdiction

The Order denying the Petition for Certification was entered by the New Jersey Supreme Court on November 16, 2007. (A-1)

The Court has jurisdiction to review this Petition for a Writ of Certiorari pursuant to 28 U.S.C. §1257(a) in that the aforesaid Order Denying Petitioner's Petition for Certification draws in question the validity of a New Jersey statute on the ground of its being violative of the United States Constitution.

Constitutional Provisions and Statutes Involved

1. Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. N.J.S.A. 13:20-35(d) provides:

> The commissioner is authorized to assess a civil administrative penalty of up to $25,000 for each violation of any provision of section 32 of this act, a Highlands permitting review approval issued pursuant to section 36 of this act, or any rule or regulation adopted pursuant to sections 33 and 34 of this act, and each day during which each violation continues shall constitute an additional, separate, and distinct offense. Any amount assessed under this subsection shall fall within a range established by regulation by the commissioner for violations of similar type, seriousness, and duration. In adopting rules and regulations establishing the amount of any penalty to be assessed, the

commissioner may take into account the economic benefits from the violation gained by the violator. No assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service. The notice shall: (1) identify the section of the law, rule, regulation, permit, approval, or authorization violated; (2) recite the facts alleged to constitute a violation; (3) state the amount of the civil penalties to be imposed; and (4) affirm the rights of the alleged violator to a hearing. The ordered party shall have 20 days from receipt of the notice within which to deliver to the commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. If no hearing is requested, the notice shall become a final order after the expiration of the 20-day period. Payment of the assessment is due when a final order is issued or the notice becomes a final order. The authority to levy an administrative penalty is in addition to all other enforcement provisions in this act and in any other applicable law, rule, or regulation, and the payment of any assessment shall not be deemed to

affect the availability of any other enforcement provisions in connection with the violation for which the assessment is levied. Any civil administrative penalty assessed under this section may be compromised by the commissioner upon the posting of a performance bond by the violator, or upon such terms and conditions as the commissioner may establish by regulation.

Statement of the Case

This appeal concerns the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1, *et seq.* ("the Highlands Act" or "the Act") a complex and confusing regulatory scheme that has created uncertainty and injustice in the development of real property in New Jersey. (A-5 – A-17)

The federal questions were raised in the New Jersey trial courts by motions for summary judgment, which resulted in the dismissal of all of Petitioner's claims. (A-11)

The New Jersey Appellate Division considered and rejected the Due Process arguments raised in the present Petition for a Writ of Certiorari (A-5 – A-17).

The New Jersey Supreme Court denied Petitioner's Petition for Certification (A-1).

Petitioner is the contract purchaser and

developer of a parcel of realty in Respondent Township of West Milford (Passaic County, New Jersey).

On May 6, 2004, after several adjournments, some of which occurred prior to the effective date of the Highlands Act, Defendant Planning Board adopted Resolution No. 2004-11 ("the Resolution") granting preliminary subdivision and bulk variance approval with conditions regarding Petitioner's property. (A-8)

In August 2004, the New Jersey Legislature passed the Highlands Act, making it retroactive to projects that received certain requisite approvals between March 30, 2004 and August 9, 2004. Thus, the Highlands Act applies to Petitioner's property that received approval in May 2004.

Argument

A. The New Jersey Appellate Court Opinion Violates *Thunder Basin Coal Co. v. Riech*, 510 U.S. 200, 114 S. Ct. 771 (1994)

The relevant statutory language is contained in N.J.S.A. 13:20-35(d) and could not be clearer:

> d. The commissioner is authorized to assess a civil administrative penalty of up to $25,000 for each violation of any provision of section 32 of this act, a Highlands permitting review approval issued pursuant to section 36 of this act, or any rule or regulation adopted

pursuant to sections 33 and 34 of this act, and each day during which violation continues shall constitute an additional, separate, and distinct offense . . . No assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service... The ordered party shall have 20 days from receipt of the notice within which to deliver to the commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. If no hearing is requested, the notice shall become a final order after the expiration of the 20-day period. ...The authority to levy an administrative penalty is in addition to all other enforcement provisions in this act and in any other applicable law, rule or regulation, and the payment of any assessment shall not be deemed to affect the availability of any other enforcement provisions in connection with the violation for which the assessment is levied. [Emphasis added].

The plain language of N.J.S.A. 13:20-35 (d) authorizes an assessment of a civil administrative penalty prior to administrative review – and prior to

even notice of a hearing concerning administrative review.

N.J.S.A. 13:20-35(b)(5), provides that the Commissioner "may", not shall, "provide notice to the person of the right to a hearing on the matters contained in the order." Contrary to the New Jersey Appellate Division opinion, under N.J.S.A 13:20-35(b)(5) the commissioner may "find a person in violation of" a provision of the Highlands Act without prior notice or a hearing. Even worse, after an adverse finding, the Commissioner is not required to provide notice to the aggrieved party "of the right to a hearing on the matters contained in that order." Ironically, in relying upon the clear language of N.J.S.A. 13:20-35(d)(4), concerning notice of the rights of a violator to a hearing after the issuance of a notice of civil administrative penalty, the New Jersey Appellate Division acknowledged inferentially that an administrative hearing comes after an assessment of a civil administrative penalty. A fatal error in the New Jersey Appellate Division Opinion below is its failure to quote the controlling, clear language concerning the timing of, and right to, a judicial hearing prior to a levy, to wit: "No assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service" [of an assessment made by the Commissioner]. This legislative expression authorizes a levy on an assessment prior to judicial review. The words could not be clearer.

It follows logically and necessarily from the *ratio decidendi* of *Thunder Basin Coal Co.* that N.J.S.A. 13:20-35(d) is constitutionally infirm in

that: a) it authorizes an assessment of substantial civil penalties prior to administrative review; b) it absolutely precludes judicial review prior to a levy of coercive civil penalties; c) compliance with the Highlands Act regulatory scheme is quite onerous; and d) the available sanctions – potent, escalating civil monetary penalties, holding in abeyance a development project, and exposure to criminal sanctions prior to judicial review - are sufficiently severe to confront citizens with a "constitutionally intolerable" choice.

B. The New Jersey Courts Deprived Petitioner Of Its Federal Due Process Rights By Dismissing The As Applied Claims For Relief Without Affording Petitioner A Shred of Discovery.

The New Jersey Courts below deprived Petitioner of its fundamental right to be heard on its as applied claims for relief, i.e., the causes of action concerning the application of the Highlands Act to Petitioner's property, which were dismissed without affording Petitioner a shred of discovery.

This being the case, the New Jersey Courts below violated Petitioner's federal constitutional right to due process. *See, Logan v. Zimmerman,* 455 U.S. 422, 424, 102 S.Ct. 1148, 1151-1152 (1982) (State "may [not] terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure."); *Lindsey v. Normet,* 405 U.S. 56, 77, 92 S.Ct. 862, 876 (1972) (due process does not require appellate review of an

eviction decision premised on a double- bond requirement "if a full and fair trial on the merits is provided;"); *Boddie v. Connecticut*,401 U.S. 371, 380, 91 S.Ct. 780, 787 (1971) (State cannot deny potential civil litigants use of a lawful adjudicatory procedure when such an action would be "the equivalent of denying them an opportunity to be heard under their claimed right."); compare *Logan*, *Lindsey* and *Boddie* with *Sosna v. Iowa,* 419 U.S. 393, 410, 95 S.Ct. 553, 562-563 (1975), 95 S.Ct. 553, (court upheld Iowa's one-year durational residency requirement for invoking its divorce jurisdiction because statute was a reasonable regulation that merely required a civil litigant to wait the requisite period of time).

CONCLUSION

In light of the above, particularly because "a state court... has decided an important question in a way that conflicts with relevant decisions of this Court," I respectfully request that the Court grant the present Petition for a Writ of Certiorari.

LOUIS L. D'ARMINIO, ESQ.
Counsel of Record
ELLIOTT LOUIS PELL, ESQ.
PRICE, MEESE, SHULMAN &
D'ARMINIO, P.C.
MACK-CALI CORPORATE CENTER
50 TICE BOULEVARD
WOODCLIFF LAKE, NJ 07677
(201) 391-3737
Counsel for Petitioner

SUPREME COURT OF NEW JERSEY
C-356 September Term 2007
61,680

CASTLE ROCK ESTATES, LLC,
Petitioner-Petitioner,

v.

ON PETITION
FOR CERTIFICATION

THE STATE OF NEW JERSEY,
THE DEPARTMENT OF ENVIRONMENTAL
PROTECTION OF THE STATE OF
NEW JERSEY, et al.,
Respondents-Respondents.

[DATE STAMP]
FILED
NOV 20 2007
/s/
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5389-05 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 16th day of

November, 2007.

/s/
CLERK OF THE SUPREME COURT

PRICE, MEESE, SHULMAN & D' ARMINIO, P.C.
Mack-Cali Corporate Center
50 Tice Boulevard
Woodcliff Lake, NJ 07677
(201) 391-3737
Attorneys for Petitioner Castle Rock Estates, LLC

SUPREME COURT OF NEW JERSEY
Docket No.

Appellate Division Docket No. A-005389-05T1

Civil Action

NOTICE OF PETITION FOR CERTIFICATION

[DATE STAMP]
RECEIVED
2007 AUG 27 P 1:15
SUPREME COURT
CLERK'S OFFICE

CASTLE ROCK ESTATES, LLC,
Plaintiff,

vs.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNHIP OF WEST MILFORD, THE GOVERNING BODY OF TOWNSHIP OF WEST MILFORD, THE PLANNING BOARD OF THE TOWNSHIP OF WEST MILFORD and JOHN DOES

I THROUGH V, PERSONS AND/OR ENTITIES WHO COOPERATED, AND/OR PARTICIPATED IN THE WRONGS ALLEGED HEREIN BUT ARE AS YET UNIDENTIFIED,

Defendants.

TO: Clerk
New Jersey Supreme Court
Hughes Justice Center
25 W. Market St.
P.O. Box 970
Trenton, NJ 08625-0970

1. Name and address of counsel:

Elliott Louis Pell, Esq.
Price, Meese, Shulman & D'Arminio, P.C.
Mack-Cali Corporate Center 50 Tice Boulevard
Woodcliff Lake, NJ 07677

2. Order:

Petitioner appeals from each and every part of the Appellate Division Decision dated August 10, 2007.

PRICE, MEESE, SHULMAN & D'ARMINIO, PC
Attorneys for Petitioner Castle Rock Estates, LLC

By: /s/
ELLIOTT LOUIS PELL, ESQ.

Dated: August 24, 2007

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5389-05T1

CASTLE ROCK ESTATES, LLC,
Plaintiff-Appellant,

v.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNSHIP OF WEST MILFORD·, THE GOVERNING BODY OF THE TOWNSHIP OF WEST MILFORD, and THE PLANNING BOARD OF THE TOWNSHIP OF WEST MILFORD,

Defendants-Rcspondcnts.

Argued June 5, 2007 - Decided August 10, 2007

Before Judges Skillman, Lisa and Holston, Jr.

On appeal from Superior Court of New Jersey, Law Division, Passaic County, Docket No. L3218-05.

Elliott Louis Pell argued the cause for

appellant (Price Meese Shulman & D'Arminio, attorneys; Mr. Pell, of counsel and on the brief).

Barbara L. Conklin, Deputy Attorney General, argued the cause for respondents state of New Jersey and Department of Environmental Protection (Stuart Rabner, Attorney General, Patrick DeAlmeida, Assistant Attorney General, of counsel; Ms. Conklin, on the brief).

Bryant Gonzalez argued the cause for respondent Township of West Milford Planning Board (Weiner Lesniak, attorneys; Mr. Gonzalez, on the brief).

Dorsey & Semrau, attorneys for respondent Township of West Milford (also named as the Governing Body of the Township of West Milford), join in the brief of West Milford Planning Board.

PER CURIAM

Plaintiff Castle Rock Estates is the contract purchaser of a twenty-eight acre undeveloped tract of land in West Milford Township, Passaic County. In late 2003, Castle Rock applied to the West Milford Planning Board for preliminary major subdivision approval to subdivide its property into seventeen residential building lots. On January 4, 2004, the

Board notified Castle Rock that it was required to obtain bulk variances. Castle Rock applied for the required variances on February 13, 2004, and three days of hearings on Castle Rock's application were held in March, April and May 2004. Castle Rock also applied to the Department of Environmental Protection (DEP) and other agencies for various permits required to proceed with its development project.

While Castle Rock's application was pending before the Planning Board, the bill that became the Highlands Water Protection and Planning Act (Highlands Act), N.J.S.A. 13:20-1 to -35, was introduced in the Legislature on March 29, 2004. This bill provided for the establishment of a state agency, called the Highlands Water Protection and Planning Council (Highlands Council), N.J.S.A. 13:20-4, which was delegated responsibility for land use planning in the Highlands Region, consisting of 800,000 acres in eighty-eight municipalities in northwestern New Jersey, including West Milford. The Highlands Act creates two areas within the Region: a preservation area, in which further development is strictly regulated, and a planning area, in which development consistent with the Act's goals is encouraged. *See* N.J.S.A. 13:20-7(b)(1); N.J.S.A.13:20-10(b), (c). Castle Rock's property is located in the preservation area.

On June 10, 2004, the Senate and General Assembly passed the Highlands Act, and on August 10, 2004, the Governor signed the Act into law.

On May 6, 2004, during the period the bill that became the Highlands Act was proceeding through the Legislature, the Board granted Castle Rock subdivision approval to create sixteen lots, fifteen of them residential building lots, on its property. However, the Highlands Act only exempts from its provisions a major Highlands development project that obtained preliminary subdivision or other required approval under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to -129, and one of a list of designated approvals from the DEP, before the Act was introduced in the Legislature on March 29, 2004. N.J.S.A. 13:20-28. Therefore, Castle Rock's proposed subdivision is subject to the Highlands permitting review program provided under N.J.S.A. 13:20-33 even though it obtained preliminary subdivision approval while the Act was pending before the Legislature.

In addition, Castle Rock's application for a General Permit No. 6 under the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-1 to -30, was pending before the DEP at the time of enactment of the Highlands Act. Shortly thereafter, the DEP notified Castle Rock by letter that under the Act it was no longer eligible for the General Permit No. 6 wetlands permit for which it had applied. The letter included detailed instructions as to how Castle Rock could obtain the required approvals for its development project under the Act.

Castle Rock requested an adjudicatory hearing before the Office of Administrative Law to challenge this ruling. On May 10, 2005, the DEP

sent a letter to Castle Rock denying the request for an adjudicatory hearing as to the unavailability of the wetlands permit. Castle Rock appealed the denial of a adjudicatory hearing to this court, and we affirmed the DEP's final decision in an unreported opinion. *In re Castle Rock Estates*, No. A-5564-04T1 (decided July 19, 2006). We stated in the course of our opinion:

> Not until May 6, 2004, did appellant receive preliminary subdivision approval to divide the property into residential lots, and because of this, development of the property is subject to the permit requirements of the Act. The Act went into effect on August 10, 2004, and established environmental standards for development in the preservation area. It also required a Highlands Preservation Area Approval for major development within the Preservation area.
>
> . . . . .
>
> . . . Appellant's request clearly was within the Preservation Area of the Highlands Region, pursuant to N.J.S.A. 13:20-7, and therefore required Highlands approval. No issue of disputed fact could be adjudicated in the Office of Administrative Law, and the action of the Department of May 10,

2005, denying appellant's hearing request is affirmed.

However, our opinion noted that we were not passing on the constitutional issues presented in this action, which had been filed approximately a year after enactment of the Highlands Act.

Castle Rock's complaint consisted of 328 numbered paragraphs and asserted 78 "claims for relief." The complaint claimed that the Highlands Act is unconstitutional in various respects both on its face and as applied to Castle Rock's property. The complaint also asserted claims against West Milford and the Board based on alleged intentional delays by municipal officials in considering plaintiff's application for preliminary subdivision and variance approval, which was granted after the March 29, 2004 cutoff date for approvals that were exempt from the Highlands Act restrictions.

The case was brought before the trial court by motions for summary judgment, which eventually resulted in the dismissal of all of Castle Rock's claims. The court also denied Castle Rock's motion to file a second amended complaint asserting additional federal constitutional claims.

On appeal from the orders dismissing its complaint and denying its motion to amend its complaint, Castle Rock presents the following arguments:

I. SINCE THE PROCEDURES FOR RESOLVING DISPUTES BETWEEN ORDINARY CITIZENS AND THE SOVEREIGN UNDER THE HIGHLANDS ACT CONTRAVENE THE FEDERAL DUE PROCESS GUARANTEE, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, THE TRIAL COURTS COMMITTED REVERSIBLE ERROR IN DISMISSING - AND IN FAILING TO GRANT PARTIAL SUMMARY JUDGMENT - ON THE SIXTY-SECOND, SEVENTY-FIFTH AND SEVENTY-SIXTH CLAIMS FOR RELIEF.

[A.] INTRODUCTION

[B.] The Highlands Act Absolutely Prohibits Pre-Enforcement Judicial Review Of All Legal Issues Raised By Persons, But Permits Pre-Enforcement Judicial Review Of All Legal Questions Raised By The Sovereign.

[C.] The Highlands Act Absolutely Precludes Judicial Review Of All Legal Issues Raised By Citizens Prior To" The Mandatory Imposition Of Serious Civil Sanctions On Them.

[D.] *Thunder Basin Coal Co. v.*

Reich, 510 U.S. 200 (1994) Mandates The Invalidation Of N.J.S.A. 13:2017(a)(2), N.J.S.A. 13:20-25, N.J.S.A. 13:20-35(a), N.J.S.A. 13:20-35(c) And N.J.S.A. 13:20-35(d) On Federal Due Process Grounds.

[E.] Application Of The Tripartite Test Enunciated In *Matthews v. Eldridge*, 424 U.S. 319 (1976) Compellingly Induces The Conclusion That N.J.S.A. 13:20-17(a)(2), N.J.S.A. 13:20-25, N.J.S.A. 13:20-35(a), N.J.S.A. 13:20-35c And N.J.S.A. 13:2035(d) Contravene The Federal Due Process Guarantee.

[1] The Private Interests That Have Been, And Will Be, Affected By Government Action Are Very Critical.

[2] The Risk Of Erroneous Deprivations Of Citizens' Property Interests From Application Of The Unfair Procedures Contained In The Highlands Act Is Very Substantial, And The Value of Additional Safeguards Is Very Considerable.

[3] The State's Interests Will Be Promoted By Pre-Deprivation

Review.

[F.] The Highlands Act Authorizes The Sovereign To Expose Citizens To Criminal Sanctions After It Has Already Imposed Serious Civil Penalties On Them Prior To Judicial Review.

[G.] The Highlands Act Permits All Causes Of Action Relating To The Regulatory Scheme To Proceed In A Summary Manner Under. R. 4:67.

II. SINCE APPELLANT WAS DEPRIVED OF A MEANINGFUL OPPORTUNITY TO BE HEARD ON THE AS APPLIED CLAIMS FOR RELIEF SET FORTH IN THE AMENDED COMPLAINT, THE TRIAL COURTS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT OF DUE PROCESS OF LAW.

III. THE TRIAL COURT ERRED REVERSIBLY IN DISMISSING APPELLANT'S CAUSE OF ACTION FOR A GOVERNMENTAL TAKING OF ITS PROPERTY WITHOUT JUST COMPENSATION ON THE GROUNDS OF RIPENESS AND FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

IV. SINCE THE RETROACTIVE PROVISION OF N.J.S.A. 13:20-28(a)(3) IS IRRATIONAL AND FUNDAMENTALLY UNFAIR, IT VIOLATES THE FEDERAL DUE PROCESS GUARANTEE AND, THEREFORE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING THE TWENTY-FIRST CLAIM FOR RELIEF.

V. THE ABSOLUTE IMMUNITY OF STATE PROJECTS FROM THE HIGHLANDS ACT BASED UPON AN AD HOC DECISION BY A COMPETING BUREAUCRAT THAT THE PROJECT IS NECESSARY FOR THE PUBLIC INTEREST, REGARDLESS OF THE PROJECT'S EFFECT UPON THE ESSENTIAL SOURCES OF DRINKING WATER IN NEW JERSEY, IS IRRATIONAL, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW AND, THEREFORE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING THE THIRTY-NINTH THROUGH FORTY-FOURTH CLAIMS FOR RELIEF.

VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING PLAINTIFF LEAVE TO FILE THE SECOND AMENDED COMPLAINT.

VII. SINCE THE NOTICE PROVISIONS OF THE TORT CLAIMS ACT CANNOT BE RELIED ON AS A DEFENSE TO A CIVIL RIGHTS CLAIM UNDER 42 U.S.C. SECTION 1983, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN GRANTING THE TOWNSHIP DEFENDANTS' MOTION TO DISMISS ON THAT BASIS.

Simultaneous with the filing of this opinion, we are filing our opinion in *OFP, L.L.C. v. State*, ___ N.J. Super. ___ (App. Div. 2007), which also involved challenges to the constitutionality of the Highlands Act. The arguments Castle Rock presents in Points III and IV of its brief are similar to arguments addressed in sections I and II(A) of the *OFP* opinion, and we reject those arguments substantially for the reasons set forth in *OFP*.

We affirm the dismissal as untimely of Castle Rock's state law claims against West Milford and its Planning Board substantially for the reasons set forth in Judge Sokalski's May 10, 2006 oral opinion. Although the single federal claim set forth in Castle Rock's amended complaint was not subject to the notice provisions of the Tort Claims Act, N.J.S.A. 59:1-1 to -7, this claim is patently without merit. *See* R. 2:11-3(e)(1)(E). Therefore, Castle Rock's federal claim was also properly dismissed.

Our review of the trial court's denial of Castle Rock's motion for leave to file a second amended complaint asserting additional federal claims is

limited to determining whether the court abused its discretion. *Brown v. Twp. of Old Bridge*, 319 N.J. Super. 476, 513 (App. Div.), *certif. denied,* 162 N.J. 131 (1999). When Castle Rock filed its motion to amend, this action had been pending for eight months and the discovery end date had passed. Furthermore, Castle Rock did not make even a prima facie showing that any of the new federal claims it sought to assert had any merit. *See Interchange State Bank v. Rinaldi*, 303 N.J. Super. 239, 257 (App. Div. 1997) (noting that "there is no point in permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted") (quoting *Mustilli v. Mustilli,* 287 N.J. Super. 605, 607 (Ch. Div. 1995). Therefore, we conclude that the trial court did not abuse its discretion in denying Castle Rock's motion to file a second amended complaint.

The arguments that Castle Rock presents under Points I, II and V of its brief are clearly without merit. R. 2:11-3(e)(1)(E). Only one of those arguments warrants short discussion. Castle Rock's primary argument in Point I is that the Highlands Act violates the Due Process Clause of the Fourteenth Amendment because it authorizes the Commissioner of the DEP to impose monetary penalties for violations of the Act without any opportunity for administrative or judicial review. However, the Act in fact provides an opportunity for both administrative and judicial review of any decision by the DEP. N.J.S.A. 13:20-35(b)(5) plainly states that whenever the Commissioner issues an order citing a person for violation of the Act, any

implementing regulation, or a Highlands permit, the Commissioner shall describe the violation, require compliance or restoration and "*provid[e] notice to the person of the right to a hearing on the matters contained in the order.*" (Emphasis added.) N.J.S.A. 13:20-35(d)(4) provides that if the Commissioner issues a notice of civil administrative penalty for a violation of the Act, its rules, or a Highlands permit, the Commissioner must notify the violator in writing of the facts alleged, the amount of the penalty to be imposed and "*affirm the rights of the alleged violator to a hearing.*" (Emphasis added.) The right to judicial review of any final decision by a state administrative agency is specifically protected by the New Jersey Constitution and implementing court rules. N.J. Const. art. VI, § 5, par. 4; R. 2:2-3(a)(2); R. 2:2-4; *see In re Senior Appeals Examiners,* 60 N.J. 356, 363 (1972). Even if there were ambiguity in the Act (and we do not find such ambiguity), it would have to be read to preserve the constitutionally protected right to administrative and judicial review of administrative action. *See In re Grant of Charter Sch. Application of Englewood on Palisades Charter Sch.,* 164 N.J. 316, 329 (2000) (noting that "[t]he Legislature is presumed to have full knowledge of, and to act consistently with, the constitution's requirements") Therefore, we reject Castle Rock's argument that the Highlands Act provides for the imposition of administrative penalties without any opportunity for "pre-enforcement judicial review." *See Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 216-18, 114 S.Ct. 771, 780-81, 127 L.Ed. 2d 29, 43-44 (1994).

Affirmed.

87

No. 07-1017

FILED

MAR 7 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

CASTLE ROCK ESTATES, LLC,

Petitioner,

v.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNSHIP OF WEST MILFORD, THE GOVERNING BODY OF THE TOWNSHIP OF WEST MILFORD, THE PLANNING BOARD OF THE TOWNSHIP OF WEST MILFORD AND JOHN DOES I THROUGH V, PERSONS AND/OR ENTITIES WHO COOPERATED, AND/OR PARTICIPATED IN THE WRONGS ALLEGED HEREIN BUT ARE AS YET UNIDENTIFIED,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bruce W. Padula, Esq.
Counsel of Record
SCARINCI & HOLLENBECK, LLC
1100 Valley Brook Avenue
Lyndhurst, NJ 07071
(201) 896-4100

Fred Semrau, Esq.
On the Brief
DORSEY & SEMRAU, LLC
714 Main Street
Boonton, NJ 07005
(973) 334-1900

Attorneys for Respondents The Township of West Milford and the Governing Body of the Township of West Milford

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

Table of Contents. i

Table of Cited Authorities ii

Reasons for Denying the Petition 1

Conclusion 5

TABLE OF CITED AUTHORITIES

Page

Constitutional Provisions

N.J. Const. art. VI, § 5, par. 4; R. 2:2-3(a)(2). 3

Case Law

Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 114 S.Ct. 771 (1994). 1

Statutory Provisions

N.J.S.A. 13:20-1 1

N.J.S.A. 13:20-35. . . . . 1, 3

N.J.S.A. 13:20-35(b). 1

N.J.S.A. 13:20-35(d). 1, 2, 3

N.J.A.C. 7:38-1.5. 3

REASONS FOR DENYING THE PETITION

The Petitioner states that N.J.S.A. 13:20-35(b)(5) deprives them of due process pursuant to *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S.Ct. 771 (1994). The New Jersey Appellate Division rejected Castle Rock's argument that the Highlands Act provides for the imposition of Administrative Penalties without any opportunity for pre-enforcement judicial review. N.J.S.A. 13:20-1 et seq. In fact, N.J.S.A. 13:20-35 specifically provides for such judicial review wherein in states:

> Recourse to any of the remedies available under this Section shall not preclude recourse to any of the other remedies prescribed in this Section or by any other applicable law.

Furthermore, counsel for the Petitioner fails to recognize that N.J.S.A. 13:20-35(b) only deals with violations to which the commissioner may require the person(s) in violation to comply with the provision or provisions violated or require the restoration of the area which is the site of the violation. It is clear that N.J.S.A. 13:20-35(b) does not deal with the imposition of civil administrative penalties. The appropriate section, which counsel for the Petitioner does cite in his submission, is N.J.S.A. 13:20-35(d).

The pertinent portion of N.J.S.A. 13:20-35(d) states:

> No assessment shall [not may] be levied pursuant to this section until after the party has been notified by certified mail or personal service. The notice shall...(4) affirm the rights of the alleged violator to a hearing. The ordered party shall have 20 days from receipt of the notice within which to deliver to the Commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. [emphasis added]

Thus, counsel for the Petitioner has misinterpreted the statute in question in his analysis presented to this Court. For instance, on page 7 of counsel's submission he states:

> Ironically, in relying upon the clear language of N.J.S.A. 13:20-35(d)(4), concerning notice of the rights of a violator to a hearing after the issuance of a notice of civil administrative penalty, the New Jersey Appellate Division acknowledged inferentially that an administrative hearing comes after an

> assessment of a civil administrative penalty. [emphasis added]

This is clearly an incorrect reading of the statute. As quoted above, N.J.S.A. 13:20-35(d) states at the end of the section:

> After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice...Payment of the assessment is due when a final order is issued or the notice becomes a final order. [emphasis added]

Again, the New Jersey Legislature has set forth clearly in the statute that no civil administrative penalty will be levied upon or become due for payment until after a final order is issued which would occur after the person is advised and afforded an opportunity for a hearing pursuant to that very same section!

Further, N.J.A.C. 7:38-1.5 sets forth specific regulations as it is entitled Requests for Adjudicatory Hearing and it specifically sets forth rules and regulations as to any person seeking to contest an assessment imposed pursuing a notice of administrative penalty assessment imposed pursuant to N.J.S.A. 13:20-35.

In addition to the administrative procedure set forth by the Highlands Act prior to issuing a final order of assessment, the New Jersey Appellate Division held that "the right to judicial review of any final decision by a State Administrative Agency is specifically protected by the New Jersey Constitution and implementing Court Rules." N.J. Const. art. VI, § 5, par. 4; R. 2:2-3(a)(2). *See* Appellate Division decision, Appendix to Petitioner's submission, A-17.

The Petitioner has failed to identify the appropriate appeal and assessment process as set forth in the laws of the State of New Jersey specifically by way of N.J.S.A. 13:20-35 in its entirety as well as the specific regulations set forth in N.J.A.C. 7:38-1.5. Petitioner's misreading of the relevant statutes has caused this unnecessary petition to be filed. The statutes are clear in their reading that prior to any levy of an assessment of a civil administrative penalty pursuant to N.J.S.A. 13:20-35(d), the person in violation is mandated to be both advised of his rights to a hearing and afforded an opportunity to request such a hearing to occur. The proper procedures are clearly set forth in the statute, thus not violating the Petitioner's due process rights.

CONCLUSION

In light of the above, particularly that the State of New Jersey has set forth a specific appeal procedure, one which provides an opportunity and hearing prior to finalizing any Administrative Penalty, we respectfully request that the Court deny the Petition for Writ of Certiorari.

Bruce W. Padula, Esq.
Counsel of Record
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
Lyndhurst, NJ 07071
(201) 896-4100

Fred Semrau, Esq.
On the Brief
Dorsey & Semrau, LLC
714 Main Street
P.O. Box 228
Boonton, NJ 07005
(973) 334-1900
Attorneys for Respondents, The Township of West Milford and the Governing Body of the Township of West Milford

87

(3)

No. 07-1017

FILED
MAR 3 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

CASTLE ROCK ESTATES, LLC,
Petitioner,

v.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNSHIP OF WEST MILFORD, THE GOVERNING BODY OF THE TOWNSHIP OF WEST MILFORD, THE PLANNING BOARD OF THE TOWNSHIP OF WEST MILFORD, AND JOHN DOES I THROUGH V, PERSONS AND/OR ENTITIES WHO COOPERATED AND/OR PARTICIPATED IN THE WRONGS ALLEGED HEREIN BUT ARE AS YET UNIDENTIFIED.

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ANNE MILGRAM
Attorney General of New Jersey

LEWIS A. SCHEINDLIN
Assistant Attorney General

RACHEL HOROWITZ*
Deputy Attorney General

R.J. Hughes Complex
25 Market Street, P.O. Box 093
Trenton, New Jersey 08625-0093
(609) 633-8109

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE AN OPPORTUNITY FOR A HEARING IS AFFORDED PERSONS SERVED WITH NOTICE OF A CIVIL ADMINISTRATIVE PENALTY PURSUANT TO N.J. STAT. ANN. §13:20-35(D) AND JUDICIAL REVIEW OF THE COMMISSIONER'S FINAL ORDER ASSESSING A SPECIFIC PENALTY IS ALSO AVAILABLE. 10

II. CERTIORARI IS NOT WARRANTED BECAUSE NEW JERSEY COURTS HAVE DISPOSED OF ALL ISSUES AMONG THE PARTIES, INCLUDING THE CLAIMS WHICH PETITIONER CHARACTERIZES AS "AS APPLIED" CLAIMS. 17

CONCLUSION 19

APPENDIX

Trial Court Order filed April 25, 2006 ..... Ra-1

Trial Court Order filed May 10, 2006 ..... Ra-4

Trial Court Order filed May 31, 2006 ..... Ra-7

Petitioner Letter re: As-Applied Claims (June 14, 2006) Ra-10

Respondent Letter re: As-Applied Claims (June 16, 2006) Ra-12

Appellate Court Order filed July 31, 2006 ..... Ra22

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS CITED

N.J. Const. Art. VI, §5, par.4 13

CASES CITED

Kleppe v. Delta Mining Inc., 423 *U.S.* 403; 96 S.Ct. 816 (1976) 15

Mathews v. Eldridge, 424 U.S. 319; 96 S.Ct. 893 (1976) 11

National Coal Operators' Assn. v Kleppe, 423 U.S. 388; 96 S.Ct. 809 (1976) 15

OFP, L.L.C. v. State, 395 N.J.Super. 591 (App.Div.), 930 A.2d. 442, certif. granted, 193 N.J. 277; 937 A.2d 979 (2007) 7-8

Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717; 104 S.Ct. 2709 (1984) 8

Thunder Basin Coal Co., v. Reich, 510 U.S. 200; 114 S.Ct. 771 (1994) 13

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172; 105 S.Ct. 3108 (1985) 7

STATUTES CITED

28 U.S.C. §1257(a) 1-2, 13

30 U.S.C. §819(a)(3) 15

30 U.S.C. §8.01 15

N.J. Stat. Ann. §2A:58A-10) 6

N.J. Stat. Ann. §13:20-1 1

N.J. Stat. Ann. §13:20-2 ..... 3, 8

N.J. Stat. Ann. §13:20-7a 3

N.J. Stat. Ann. §13:20-13h(2) 6

N.J. Stat. Ann. §13:20-16 ..... 6, 9

N.J. Stat. Ann. §13:20-17a 6

N.J. Stat. Ann. §13:20-20 6

N.J. Stat. Ann. §13:20-25 6

N.J. Stat. Ann. §13:20-28 4

N.J. Stat. Ann. §13:20-28a(1) 4

N.J. Stat. Ann. 13:20-28(a)(3) 4, 6, 8

N.J. Stat. Ann. §13:20-30 3

N.J. Stat. Ann. §13:20-30a 3

N.J. Stat. Ann. §13:20-31a 3

N.J. Stat. Ann. §13:20-33b(3) 3

N.J. Stat. Ann. §13:20-35 10

N.J. Stat. Ann. §13:20-35(a) 4, 10, 17

N.J. Stat. Ann. §13:20-35(b) 5, 10, 11

N.J. Stat. Ann. §13:20-35(c) 5, 6, 10

N.J. Stat. Ann. §13:20-35(d) 2, 5, 9, 10, 12-16

N.J. Stat. Ann. §13:20-35(e) 6, 10

N.J. Stat. Ann. §13:20-35(f) 5, 11

N.J. Stat. Ann. §52:14B-1 13

N.J. Stat. Ann. §59:1-1 8

REGULATIONS CITED

N.J. Admin. Code tit.1 13

N.J. Admin. Code tit.7 ..... 3-4, 12-13

COURT RULES CITED

N.J. Court Rule 2:2-3(a)(1) 7

N.J. Court Rule 2:2-3(a)(2) 5, 9, 13

N.J. Court Rule 2:2-3(b) 7

N.J. Court Rule 4:6-2(e) 5

N.J. Court Rule 4:69 8

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Petitioner asks this court to review the New Jersey Supreme Court's decision (Pa1)[1] denying a petition to review an appellate court decision rejecting a due process challenge to a penalty provision of the New Jersey Water Protection and Planning Act, *N.J. Stat. Ann.* §13:20-1 *et seq.*, also known as the Highlands Act. The provision in question, *N.J. Stat. Ann.* §13:20-35(d), authorizes the Commissioner of the New Jersey Department of Environmental Protection (DEP) to levy a civil administrative penalty upon a person found to have violated the Highlands Act, its implementing regulations, or the terms of a Highlands permit. Petitioner, who has never been the subject of a Highlands enforcement action, alleges that *N.J. Stat. Ann.* §13:20-35(d) violates the due process guarantee of the Fourteenth Amendment and that, therefore, the Court should grant its petition pursuant to 28 *U.S.C.* §1257(a).

The Court should deny the petition because both administrative and judicial review is available to persons against whom a DEP penalty has been assessed. (Pa16). *N.J. Stat. Ann.* §13:20-35(d) provides that DEP shall levy no administrative penalty until

---

[1] "Pa" refers to the Appendix to the Petition For Certiorari. "P" refers to the Petition for Certiorari. "Ra" refers to the Appendix to the Brief in Opposition to the Petition ("Respondent's Appendix").

after the party has been notified by certified mail or personal service in writing of (1) the law, regulation or permit violated; (2) the facts alleged to constitute a violation; (3) the amount of the proposed penalty; and (4) that party's right to a hearing. *Ibid.* The statute further specifies that the Commissioner may issue a final order assessing a penalty "after the hearing and upon finding that a violation has occurred." *Ibid.* The Commissioner is also authorized to adjust or "compromise" the fine from that stipulated in the notice based upon the circumstances of the case. *Ibid.* Judicial review of any agency final order, including a final order assessing a penalty, is guaranteed in the New Jersey Constitution and implementing Court rules. (Pa17). *N.J.Const.* art. VI, §5, par.4; *N.J. Court Rule* 2:2-3(a)(2), -4. Since administrative and judicial review of a civil penalty is available, the New Jersey appellate court's decision to dismiss petitioner's due process challenge to *N.J. Stat. Ann.* §13:20-35(d) was correct and the New Jersey Supreme Court's decision not to review that decision implicates no due process right under the Fourteenth Amendment requiring this Court's review pursuant to 28 *U.S.C.* §1257(a).

Petitioner also seeks this Court's review based upon its claim that it was deprived of discovery on fifteen "as applied" claims for relief, claims which petitioner neither describes in its brief nor documents in its appendix. (Pb8). However, DEP documented for the New Jersey courts that these so-called "as applied" claims were contained in the first 250-paragraphs of the Complaint which petitioner called "The Statement Of The Case" and that these claims were addressed in the parties' motions and the courts' decisions. (Ra15 to

Ra19). Since this aspect of the petition is without foundation, the New Jersey Supreme Court's decision declining review implicates no due process right.

The New Jersey Legislature enacted the Highlands Act on August 29, 2004 for the express purpose of preserving the water supply and other natural resources in the New Jersey Highlands from further loss to unplanned, inappropriate development. *N.J. Stat. Ann.* §13:20-2. The Legislature delineated a 415,000 acre Protection Area in *N.J. Stat. Ann.* §13:20-7a, and created in *N.J. Stat. Ann.* §13:20-30 specific protection for the forests, streams and watersheds therein, which DEP was required to apply to proposed development in the Preservation Area until DEP could promulgate comprehensive land use standards protective of the unique Highlands environment. *N.J. Stat. Ann.* §13:20-31a. Thus, as of August 29, 2004, a DEP Highlands permit was required for major development in the Preservation Area. *N.J. Stat. Ann.* §13:20-30a.

DEP promulgated its Highlands permit regulations on May 9, 2005. *N.J. Admin. Code* tit.7, §38; 37 *N.J. Reg. 2050(a).* All other state permit standards that might have previously applied to a proposed project, *e.g.,* the Freshwater Wetlands Program, *N.J. Admin. Code* tit.7, §9B-1 *et seq.*, were incorporated into the Highlands Permit program. *Ibid.* Pursuant to *N.J. Stat. Ann.* §13:20-33b(3), DEP may waive any Highlands permit requirement in order to avoid "taking" property without just compensation. *N.J. Admin. Code* tit.7, §38-6.4. Petitioner, whose property is located in the Preservation Area (Pa7), has

neither applied to DEP for a Highlands permit to develop its property, nor sought a waiver of any Highlands permit requirement. (Pa8).

Not all development requires a Highlands permit. In *N.J. Stat. Ann.* §13:20-28, the Legislature exempted 18 types of activity or development in the Preservation Area from the permitting requirements of the Highlands Act, including construction of one single-family home on any lot in existence as of August 29, 2004. *N.J. Stat. Ann.* §13:20-28a(1). See, also, *N.J. Admin. Code* tit.7, §38-2.3. The Legislature also exempted any development project that had obtained all necessary federal, state and local approvals by March 29, 2004, the date the Act was first introduced into the Legislature. *N.J. Stat. Ann.* §13:20-28a(3); *N.J. Admin. Code* tit.7, §38-2.3(a)3. The practical effect of this provision was to prevent a rush for local development approvals between the time the Act was introduced in the Legislature on March 29, 2004 and the time it was adopted on August 29, 2004. Since Petitioner did not receive its subdivision approval until May, 2004, petitioner's project is subject to the permitting requirements of the Highlands Act. (Pa8).

Like other state environmental regulatory programs, the Highlands Act affords DEP enforcement power. *N.J. Stat. Ann.* §13:20-35(a) allows, but does not require, the Commissioner to take a variety of actions in the event the Commissioner finds that a person has violated the Highlands Act, its regulations or the terms of a Highlands permit. The Commissioner may issue an order identifying the violation, compelling compliance with the specified law,

regulation or permit, and advising the person of the right to a hearing pursuant to *N.J. Stat. Ann.* §13:20-35(b), may commence a civil action for injunctive relief, restoration and compensation with all its attendant procedural protections pursuant to *N.J. Stat. Ann.* §13:20-35(c), may assess a civil administrative penalty following written notice and opportunity for a hearing pursuant to *N.J. Stat. Ann.* §13:20-35(d), or may petition the Attorney General to bring a criminal action pursuant to *N.J. Stat. Ann.* §13:20-35(f).

One year after the Act became law, petitioner filed a 328-paragraph complaint in Superior Court, Law Division (Pa10) alleging that the Highlands Act took its property without just compensation, that ten sections of the Act including *N.J.Stat. Ann.* §13:20-35(d) and three DEP Highlands regulations were unconstitutional, and alleging that the Township of West Milford deliberately delayed action on its subdivision application in order to deny it an exemption from the Act. (Ra1 to Ra 9). Defendants were the State of New Jersey DEP, the Planning Board and Governing Body of the Township of West Milford, and various "John Does."

DEP filed three motions to dismiss various portions of the complaint for failure to state a claim pursuant to *N.J. Court Rule* 4:6-2(e). By order dated April 25, 2006 (Ra1), the trial court granted DEP's motion and dismissed petitioner's inverse condemnation claim on grounds of unripeness, dismissed petitioner's regulatory challenges on grounds of improper venue pursuant to *N.J. Court Rule* 2:2-3(a)(2), and dismissed petitioner's equal

protection, due process and conflict of interest challenge to *N.J. Stat. Ann.* §13:20-13h(2) (establishing priority for transfer of development rights), *N.J. Stat. Ann.* §13:20-16 (allowing State development projects to proceed if the sponsoring department of government finds the project necessary for public health, safety and welfare), *N.J. Stat. Ann.* §13:20-17a (authorizing Highlands Council review of local government action), *N.J. Stat. Ann.* §13:20-20 (affording legal counsel to municipalities with Master Plans compliant with the Regional Master Plan), *N.J. Stat. Ann.* §13:20-25 (granting the Highlands Council authority to seek injunctive relief for violations of the Act), *N.J. Stat. Ann.* §13:20-35(c) and (d) (granting NJDEP authority to seek criminal or civil administrative penalties for violations), and *N.J. Stat. Ann.* §13:20-35(e) (permitting DEP to collect previously assessed penalties in a summary proceeding under the "Penalty Enforcement Law of 1999" *N.J. Stat. Ann.* §2A:58A-10). The trial court also denied Petitioner's motion for Summary judgement on those claims.

By order dated May 10, 2006, the trial court dismissed petitioner's claims against the Township concerning its local subdivision application. (Ra4 to Ra6). Finally, by order dated May 31, 2006 (Ra7 to Ra9), the trial court dismissed petitioner's due process and equal protection challenge to *N.J. Stat. Ann.* §13:20-28a(3) (the exemption for developments with approvals in hand by March 29, 2004). The trial court denied Petitioner's motion for summary judgment on this claim as well.

Petitioner filed a Motion For Leave To Appeal select portions of these orders pursuant to *N.J. Court Rule* 2:2-3(b), arguing that the matter was interlocutory in nature since the Court had not adjudicated fifteen "as-applied claims." (Ra11). DEP opposed the motion, arguing that the trial court had adjudicated all issues among the parties, and that each "as applied" claim had been replicated in petitioner's 250-paragraph "Statement of the Case" which had been addressed by the trial court orders described above. (Ra15 to Ra19). Petitioner then filed a standard Notice of Appeal pursuant to *N.J.Court Rule* 2:2-3(a)(1) but did not withdraw its motion. By order dated July 20, 2006 (Ra21), the appellate court denied Petitioner's motion which alleged the matter was interlocutory, the Notice of Appeal was accepted, and the appeal was briefed and argued.

In an unpublished opinion, the appellate court affirmed the trial court order dismissing petitioner's claim that application of the Highlands Act deprived it of property without just compensation (Pa15) substantially for the reasons set forth in *OFP, L.L.C. v. State,* 395 *N.J.Super.* 591 (App.Div.), 930 *A.*2d. 442, certif. granted, 193 *N.J.* 277; 937 *A.*2d 979 (2007). In *OFP*, the court held that a claim of inverse condemnation arising from application of the Highlands Act was unripe because the OFP had not yet applied to DEP for a Highlands permit or a permit waiver, thereby allowing DEP to arrive at "a final, definitive position" as to how the Act applied to OFP's property. 395 *N.J.Super* at 586-587; 930 *A.*2d. at 451 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 *U.S.* 172, 191

(1985)).

The appellate court also cited *OFP* in affirming the trial court order rejecting petitioner's due process and equal protection challenge to *N.J. Stat. Ann.* §13:20-28(a)(3) (exempting projects with permits in hand by March 29, 2004). (Pa15). In *OFP,* the appellate court held that the retroactive application of *N.J. Stat. Ann.* §13:20-28(a)(3) for the period between March and August, 2004 did not violate guarantees of equal protection under either the New Jersey or United States Constitutions because it was a rational means of furthering the legitimate governmental purpose set forth in *N.J. Stat. Ann.* §13:20-2, namely, to confer immediate protection upon Highlands natural resources in "imminent peril" of being "fragmented and consumed" by development. 395 *N.J.Super.* at 592; 930 *A.*2d. at 453-455 (citing *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 *U.S.* 717, 729 (1984)).

The appellate court also affirmed the dismissal of petitioner's state law claims due to petitioner's failure to timely challenge an action of a municipality pursuant to *N.J. Court Rule* 4:69 and failure to timely file a Notice of Claim pursuant to *N.J. Stat. Ann* §59:1-1 *et seq.* (Ra4 to Ra6) and, furthermore, rejected petitioner's federal civil rights claims against Township "John Does" for violation of unspecified constitutional rights as "patently without merit." (Pa15).

Finally, the appellate court affirmed dismissal of the remainder of petitioner's claims on appeal (Pa16

to Pa17), namely, that the Highlands Act precluded pre-enforcement judicial review of its provisions (Pa11 to Pa13), that petitioner had been deprived of discovery on its "as-applied" claims (Pa13), and that *N.J. Stat. Ann.* §13:20-16 (allowing State development projects to proceed if the sponsoring department of government finds the project necessary for public health, safety and welfare) was "irrational" (Pa14). In particular, the appellate court held that *N.J. Stat. Ann.* §13:20-35(d) provides an opportunity for administrative review of any DEP decision to assess a penalty (Pa16), and that judicial review of any final decision by a state administrative agency is guaranteed by the New Jersey Constitution and implementing Court rules. (Pa17). *N.J. Const.* art. VI, §5, par.4; *N.J. Court Rule* 2:2-3(a)(2), -4.

ARGUMENT

I. CERTIORARI IS NOT WARRANTED BECAUSE AN OPPORTUNITY FOR A HEARING IS AFFORDED PERSONS SERVED WITH NOTICE OF A CIVIL ADMINISTRATIVE PENALTY PURSUANT TO *N.J. STAT. ANN.* §13:20-35(D) AND JUDICIAL REVIEW OF THE COMMISSIONER'S FINAL ORDER ASSESSING A SPECIFIC PENALTY IS ALSO AVAILABLE.

Petitioner claims that *N.J. Stat. Ann.* §13:20-35 does not obligate the DEP Commissioner to afford a hearing to a person found in violation of the Highlands Act (Pb7) and that, therefore, the New Jersey courts erred in concluding that *N.J. Stat. Ann.* §13:20-35 comports with principles of due process. The claim arises from a misreading of *N.J. Stat. Ann.* §13:20-35 and has no merit.

N.J. Stat. Ann. §13:20-35(a) allows but does not require the Commissioner to take a variety of actions in the event the Commissioner finds that a person has violated the Highlands Act, its regulations or the terms of a Highlands permit. Thus, *N.J. Stat. Ann.* §13:20-35(a) stipulates that the Commissioner "may" issue an order requiring compliance pursuant to *N.J. Stat. Ann.* §13:20-35(b), bring a civil action for compliance or restoration pursuant to *N.J. Stat. Ann.* §13:20-35(c), levy a civil administrative penalty pursuant to *N.J. Stat. Ann.* §13:20-35(d), seek a court order collecting a penalty pursuant to *N.J. Stat. Ann.*

§13:20-35(e), or petition the Attorney General to bring a criminal action pursuant to *N.J. Stat. Ann.* §13:20-35(f).

Petitioner argues that *N.J. Stat. Ann.* §13:20-35(b) provides that the Commissioner "may" provide notice to a person of a right to a hearing, but does not require a hearing. This is incorrect. *N.J. Stat. Ann.* §13:20-35(b) actually provides that the Commissioner "may" issue a order requiring compliance or restoration. In other words *N.J. Stat. Ann.* §13:20-35(b) affords the Commissioner the discretion to issue an order compelling compliance with the Act, its rules, a permit or another DEP order. However, if the Commissioner elects to issue an order, the order must:

> specif[y] the provision or provisions of the law, rule, regulation, permit, approval, or authorization of which the person is in violation; (2) cit[e] the action which constituted the violation; (3) requir[e] compliance with the provision or provisions violated; (4) requir[e] the restoration of the area which is the site of the violation; and (5) provid[e] notice to the person of the right to a hearing on the matters contained in the order. [*N.J. Stat. Ann.* §13:20-35(b); bracketed material added for grammatical reasons.]

Thus, *N.J. Stat. Ann.* §13:20-35(b) affords a person against whom an order is issued notice of the case against him and a meaningful opportunity to meet it. This is the "essence of due process." Mathews v. Eldridge, 424 *U.S.* 319, 349-350 (1976).

Likewise, the Commissioner is authorized, but not required, to assess a civil administrative penalty pursuant to *N.J. Stat. Ann.* §13:20-35(d), for a violation of the Highlands Act, its regulations or a Highlands permit. However, "[n]o assessment shall be levied pursuant to this section until after the party has been notified by certified mail or personal service." *Ibid.* Furthermore, the notice shall:

> identify the section of the law, rule, regulation, permit, approval, or authorization violated; (2) recite the facts alleged to constitute a violation; (3) state the amount of the civil penalties to be imposed; and (4) affirm the rights of the alleged violator to a hearing. [*N.J. Stat. Ann.* §13:20-35(d)]

The ordered party has 20 days from receipt of the notice within which to deliver to the Commissioner a written request for a hearing. *Ibid.* After the hearing and upon finding that a violation has occurred, the Commissioner may issue a final order after assessing the amount of the fine specified in the notice. *Ibid.* The Commissioner may also adjust or "compromise" the amount of the penalty. *Ibid.* If no hearing is requested, the notice becomes a final order after the expiration of the 20-day period. *Ibid.* DEP regulations at *N.J. Admin. Code* tit.7, §38-1.5(b) state that persons contesting civil orders or notice of civil administrative penalty assessments may request hearings. The filing requirements and procedures for such hearings are set forth in *N.J. Admin. Code* tit.7, §38-13.13. All such hearings are conducted in accordance with the New

Jersey Administrative Procedure Act, *N.J. Stat. Ann.* §52:14B-1 *et seq.* and the Uniform Administrative Procedure rules, *N.J. Admin. Code* tit.1, §1. See, *N.J. Admin. Code* tit.7, §38-13.13(e), which require plenary hearing procedures.

Judicial review of any final decision by a state administrative agency, whether by order or civil penalty assessment, is guaranteed by the New Jersey Constitution and implementing Court rules. (Pa17).*N.J. Const.* art. VI, §5, par.4; *N.J. Court Rule* 2:2-3(a)(2), -4. Since administrative and judicial review of the penalty is available, the New Jersey appellate court's decision to dismiss petitioner's due process challenge to *N.J. Stat. Ann.* §13:20-35(d) was correct and the New Jersey Supreme Court's decision declining to review that decision implicates no due process right under the Fourteenth Amendment requiring this Court's review pursuant to 28 *U.S.C.* §1257(a).

Petitioner alleges, but does not explain, why the hearing procedures in *N.J. Stat. Ann.* §13:20-35(d) compromise or contradict the holding in *Thunder Basin Coal Co., v. Reich*, 510 *U.S.* 200 (1994). (Pb7). No aspect of *N.J. Stat. Ann.* §13:20-35(d) is implicated in the case. Thunder Basin, a mine operator, sued in district court challenging the Mine Safety and Health Administration's instruction that it post the names of the two representatives its employees had chosen pursuant to the Mine Act to participate in mine inspections, obtain certain health and safety information and promote health and safety enforcement. The mine operator's objection was that

the designated representatives were not its employees, but were employed by the union. Although there was a statutory procedure for administrative review of a citation for violation of such an order, the mine operator challenged the Administration's interpretation of the Mine Act as permitting such designations by seeking a pre-enforcement injunction from the district court.

A unanimous Supreme Court held that the district court lacked jurisdiction over Thunder Basin's pre-enforcement challenge based upon the Mine Act's language and its legislative history. *Id.* at 216. The court held that factual disputes could be heard by an administrative law judge while legal challenges to the Act's interpretation could be brought before the Federal Mine Safety and Health Review Commission whose decision could be challenged in the appropriate court of appeals. *Ibid.*

Unlike Thunder Basin, petitioner Castle Rock raises no as-applied challenge to *N.J. Stat. Ann.* §13:20-35(d) requiring the court to decide whether an administrative or judicial forum is better suited for its disposition. Indeed, Castle Rock can make no as-applied claim because it has never been the subject of an enforcement action pursuant to the Highlands Act. As explained above, Castle Rock's case is a facial due process challenge to *N.J. Stat. Ann.* §13:20-35(d) which rests solely upon a misreading of the statute's provisions. Since *N.J. Stat. Ann.* §13:20-35(d) provides an opportunity for an administrative hearing upon receipt of a notice of assessment to contest the underlying facts as well as the amount of the penalty,

and judicial review of a final order of penalty assessment is also available, the New Jersey Supreme Court acted in accordance with federal and state due process principles by declining to review the state appellate court decision dismissing petitioner's due process challenge to *N.J. Stat. Ann.* §13:20-35(d).

This Court has previously reviewed a civil penalty assessment mechanism virtually identical to *N.J. Stat. Ann.* §13:20-35(d) and found it unremarkable. In *Kleppe v. Delta Mining Inc.*, 423 *U.S.* 403 (1976), assessment officers sent proposed civil penalty assessment orders to certain mine operators, based on the operators' violations of the Federal Coal Mine Health and Safety Act of 1969 (30 *U.S.C.* §8.01 *et seq.*). The operators protested the amount of the proposed assessments, but since they did not request a formal administrative hearing, the proposed orders became the final assessment orders of the Secretary of the Interior pursuant to 30 *U.S.C.* §819(a)(3). *Id.* at 406. When the operators failed to pay the assessments, the Secretary instituted proceedings against them in the United States District Court for the Western District of Pennsylvania, seeking enforcement of the assessments.

The District Court entered judgments in favor of the mine operators, holding that the assessments were fatally defective for the Secretary's failure to support the assessment orders with fact findings. This Court reversed and remanded for calculation of penalty, holding that under a companion case, *National Coal Operators' Assn. v Kleppe,* 423 *U.S.* 388 (1976), the rules did not compel the Secretary to support his final

assessment orders with express fact findings as to the violation and the amount of the penalty unless the mine operator requested an administrative hearing.

N.J. Stat. Ann. §13:20-35(d) provides the same notice of penalty assessment that this Court found unremarkable in *Kleppe*. Since *N.J. Stat. Ann.* §13:20-35(d) affords an opportunity for a hearing upon receipt of the proposed penalty and allows judicial challenge of a final order, there is no foundation for petitioner's claim that *N.J. Stat. Ann.* §13:20-35(d) violates the due process guarantees of the Fourteenth Amendment, and the petition should be denied.

II. CERTIORARI IS NOT WARRANTED BECAUSE NEW JERSEY COURTS HAVE DISPOSED OF ALL ISSUES AMONG THE PARTIES, INCLUDING THE CLAIMS WHICH PETITIONER CHARACTERIZES AS "AS APPLIED" CLAIMS.

Petitioner seeks this Court's review based upon its claim that it was deprived of discovery on fifteen "as applied" claims for relief, claims which petitioner neither describes in its brief or documents in its appendix. (Pb8). As noted earlier, petitioner's "as-applied" claims are illusory since it has not submitted an application for a Highlands Permit or been the subject of an enforcement action. However, DEP documented for the New Jersey courts that the claims which petitioner identified as "as applied" claims were contained in the first 250-paragraphs of the Complaint which petitioner called "The Statement Of The Case" and that these claims were addressed in the parties' motions and the courts' decisions. (Ra15 to Ra19).[2]

---

[2] Petitioner alleges that the following are "as-applied" claims: that the Highlands Act is an abuse of Legislative discretion; that the Act is not rationally related to its desired ends; that the Act is arbitrary and unreasonable; that the Act is not rationally related to a legitimate State interest; that the Act deprives petitioner of its property without due process of law in violation of the state and federal constitutions; that the Act deprives petitioner of its property in violation of the equal protection guarantees of the state and federal constitutions; that the Act is unlawful *ex post facto* legislation that violates the state and federal constitutions; that Defendants have failed to "turn square corners" with petitioner; and that various "john does" have violated Petitioner's constitutional rights. (Ra15 to Ra19).

Since this aspect of the petition is without foundation, the New Jersey Supreme Court's decision declining review of the appellate court decision dismissing petitioner's claims implicates no due process right.

CONCLUSION

For the foregoing reasons, the Petition for a writ of *Certiorari* should be denied.

Respectfully submitted,

ANNE MILGRAM
Attorney General of New Jersey

LEWIS SCHEINDLIN
Assistant Attorney General

RACHEL HOROWITZ*
Deputy Attorney General

25 Market Street
R.J. Hughes Complex
P.O. Box 093
Trenton, New Jersey 08625-0093
(609) 633-8109

*Counsel of Record

Dated: March 4, 2008

APPENDIX

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY
R. J. Hughes Justice Complex
25 Market Street
P.0. Box 093
Trenton, New Jersey 08625
Attorney for State Defendants
By: Barbara L. Conklin, D.A.G.
(609) 633-8109

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - PASSAIC COUNTY
DOCKET NO. PAS-L-003218-0S

CASTLE ROCK ESTATES, LLC,

Plaintiff,

v.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNSHIP OF WEST MILFORD, THE GOVERNING BODY OF THE TOWNSHIP OF WEST MILFORD, THE PLANNING BOARD OF THE TOWNSHIP OF WEST MILFORD, AND JOHN DOES I THROUGH 5,

Defendants

ORDER GRANTING STATE DEFENDANTS' FEBRUARY 8, 2006 MOTION IN PART AND RESERVING DECISION ON DUE PROCESS AND EQUAL PROTECTION ISSUES

THIS MATTER having been opened to the Court on the application of Zulima V. Farber, Attorney General of New Jersey, attorney for New Jersey Department of Environmental Protection and the State of New Jersey (Barbara L. Conklin, D.A.G., appearing); And the Court having considered the brief, certification of counsel and exhibits in support of the motion, Plaintiff's brief in opposition to the motion and oral argument on March 31, 2006 by counsel for Plaintiff and State Defendants;

And with notice to the Township of West Milford and the West Milford Planning Board, neither of which filed written response to the motion;

It is on the 25th Day of April, 2006

1. ORDERED that State Defendants' motion to dismiss the portions of the complaint challenging N.J.A.C. 7:38-3.5, N.J.A.C. 7:38-6.4 and N.J.A.C. 7:38-6.8 for lack of jurisdiction pursuant to R. 2:2-3 (a) (2) is granted; and it is further

2. ORDERED that State Defendants' motion to dismiss the complaint against State Defendants without prejudice, pending resolution of I/M/O Castle Rock Estates, Docket No. 5564-04T1 is denied without prejudice; and it is further

3. ORDERED that State Defendants' motion to dismiss Plaintiff's claim that the Highlands Act, N.J.S.A. 13:20-1 et seq. and/or its implementing regulations, N.J.A.C. 7: 38, take Plaintiff's property without just compensation is hereby granted, on the

grounds of unripeness and failure to exhaust administrative remedies; and it is further

4. ORDERED that decision is reserved on State Defendants' motion to dismiss plaintiff's due process and equal protection claims arising from N.J.S.A. 13:20-28a(3) until April 28, 2006 or such time as the court hears oral argument on Plaintiff and State defendants' respective motions for judgment on Plaintiff's facial challenge to N.J.S.A. 13:20-16, N.J.S.A. 13:20-17, N.J.S.A. 13:20, N.J.S.A. 13:20-25, N.J.S.A. 13:20-26 and N.J.S.A. 13:20-35; and it is further

5. ORDERED that State Defendants' motion for a protective order pursuant to R. 4: 10-3 (b) relieving State Defendants from the obligation to respond to Plaintiff's interrogatories and requests for documents is hereby granted, and it is further

6. ORDERED that State Defendants' counsel shall serve a copy of this signed order upon all counsel within 7 days of its receipt from the Court

/S/
Anthony J. Graziano, J.S.C.

X Motion Opposed
X Oral Argument Heard on March 31, 2006
X Oral Conclusions of Law Placed on the Record March 31, 2006

Filed: April 25, 2006
Anthony J. Graziano, Judge Superior Court

WEINER LESNIAK LLP
629 Parsippany Road
Post Office Box 438
Parsippany, New Jersey 07054-0438
(973) 403-1100 Fax: (973) 403-0010
Attorneys for Defendant, WEST MILFORD PLANNING BOARD

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
DOCKET NO. PAS-L-32 I 8-05

CASTLE ROCK ESTATES, LLC,
Plaintiff(s)

vs.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNSHIP OF WEST MILFORD, THE GOVERNING BODY OF THE TOWNSHIP OF WEST MILFORD, THE PLANING BOARD OF THE TOWNSHIP OF WEST MILFORD and JOHN DOES I THROUGH V. PERSONS AN/OR ENTITIES YET TO BE IDENTIFIED,

Defendant(s)

ORDER

THIS MATTER having been brought before the Court pursuant to, R.4:37-2(a); R.4:10-2; R.1:9-2 and R.4:10-3 on joint application of Defendant, West Milford Planning Board (Bryant Gonzalez, Esq., appearing), Defendant, Township of West Milford (also named as the Governing Body to the Township of West Milford) (Fred Semrau, Esq., appearing) and William H. Drew, a non-party, (Fred Semrau, Esq., appearing) for an Order: (I) Dismissing the Plaintiff's Complaint as against the defendants, West Milford Planning Board and Township of West Milford (also named as the Governing Body to the Township of West Milford); (2) Quashing the Plaintiff's Notice to Produce and Interrogatories served as against the defendants, West Milford Planning Board and Township of West Milford (also named as the Governing Body to the Township of West Milford); (3) Quashing the Plaintiff's subpoena ad testifcandum served on William H. Drew, a non-party to this action; and (4) for the entry of a Protective Order directing Plaintiff to cease and desist discovery activities as against the defendants, West Milford Planning Board and Township of West Milford (also named as the Governing Body to the Township of West Milford), as well as William H. Drew, a non-party to this action, and the Court having considered this matter and all arguments and briefs of counsel for the parties and for good cause appearing,

IT IS on this 10 day of May, 2006;

ORDERED that the Notice of Motion to Dismiss Plaintiff's Complaint as against the Defendant, West Milford Planning Board, for failure to timely file a Notice of Claim pursuant to N.J.S.A. 59: 1-1 et seq., is hereby granted with prejudice; and it is further

ORDERED that the Notice of Motion to Dismiss Plaintiff's Complaint as against the Defendant, Township of West Milford (also named as the Governing Body to the Township of West Milford), for failure to timely file a Notice of Claim pursuant to N.J.S.A. 59: 1-1 et seq., is hereby granted with prejudice; and it is further

ORDERED that within 10 days of this Order being received by the moving party, a true copy of this Order shall be served upon all counsel.

S/_____
Ronald b. Sokalski, J.S.C.

Papers considered:

____ No opposition

_X_ Opposition

Reasons are set forth
On the record of 5/10/06

Filed: May 10, 2006
Ronald B. Sokalski, J.S.C.

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY
R. J. Hughes Justice Complex
25 Market Street
P.O. Box 093
Trenton, New Jersey 08625
Attorney for State Defendants
By, Barbara L. Conklin, D.A.G.
(609) 633-8109

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - PASSAIC COUNTY
DOCKET NO. PAS-L-003218-05

CASTLE ROCK ESTATES, LLC,
Plaintiff,
v.
THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE: OF NEW JERSEY, THE TOWNSHIP OF WEST MILFORD, THE GOVERNING BODY OF THE TOWNSHI P OF WEST MI LFORD, THE PLAING BOARD OF: THE TOWNSHIP OF WEST MILFORD, AND JOHN DOES I THROUGH 5,

Defendants.

ORDER GRANTING STATE DEFENDANTS' FEBRUARY 8, 2006 MOTION TO DISMISS PLAINTIFF'S DUE PROCESS AN EQUAL PROTECTION CHALLENGE TO N.J.S.A. 13:20-28a(3)

THIS MATTER having been opened to the Court on the application of Zulima V. Farber, Attorney General of New Jersey, attorney for New Jersey Department of Environmental Protection and the State of N'ew Jersey (Barbara L. Conklin, D.A.G., appearing) with notice to Plaintiff, represented by Elliot Louis Pell, Esq;

And the Court having heard oral argument on the motion by Plaintiff and State Defendants' counsel on March 31, 2006;

And the Court having issued an Order on April 25, 2006 granting State Defendants' motion in part and reserving decision on the portion of State Defendants' motion seeking an order dismissing Plaintiffs' constitutional challenges to N.J.S.A. 13:20-28a(3);

And the Court having considered State Defendants' February 8, 2006 brief, certification of counsel and exhibits in support of the motion; State Defendants' April 13, 2006 letter and exhibits in further support of the motion; Plaintiff's March 15, 2006 brief in opposition to the motion; and oral argument on March 31, 2006;

And the Court having provided plaintiff the opportunity to submit any additional objection by May 26, 2006;

And the Court having received none,

It is on the 31st Day of May, 2006

1. ORDERED that the portions of Plaintiff's complaint alleging that N.J.S.A. 13:20-28a (3) violate the federal and state constitutional guarantee of due process and equal protection of the law is hereby DISMISSED with prejudice; and it is further

2. ORDERED that State Defendants' counsel shall serve a copy of this signed order upon all counsel within 7 days of its receipt from the Court.

S/_____
Anthony Grazino, J.S.C..

X Motion Opposed
X Oral Argument Heard on March 31, 2006
X Oral Conclusions of Law Placed on the Record 2006

Filed: May 31, 2006
Anthony J. Graziano, Judge Superior Court

PRICE, MEESE, SHULMAN & D'ARMINIO, P.C.
50 TICE BLVD.
WOODCLIFF LAKE, NJ 07677

June 14, 2006

John M. Chacko,Clerk
Superior Court of New Jersey
Appellate Division
25 West Market Street, R. J. Hughes Complex
Trenton, New Jersey 08625-006

Re: Castle Rock Estates, LLC v. State of New Jersey, et al.

Dear Sir:

I have at hand the letter dated June 13, 2006 from Deputy Attorney General Barbara L. Conklin in opposition to plaintiff Castle Rock Estates, LLC's Motion for Leave to Appeal. The State's argument - that the Court should deny the aforesaid Motion because plaintiff has an appeal as of right, in that "on May 31, 2006, the trial court granted the State's motion and dismissed the last remaining portion of plaintiff's complaint" (letter dated June 13, 2006, p.3) is absurd.

Reference to the Orders dated May 10, 2006 and May 31, 2006 demonstrates the point beyond peradventure. Specifically, the Order dated May 10, 2006 provides: That the plaintiff's facial challenges to the Highlands Act are hereby dismissed with

prejudice for the reasons set forth by the Court on the record of May 10, 2006.

Although the May 10, 2006 Order fails to specify the identity of the "facial challenges to the Highlands Act," it cannot be denied that that Order has no relation whatsoever to the as applied claims for relief. Nor does the Order dated May 31, 2006, which was issued after the submission of the present Motion for Leave to appeal. That Order provides in pertinent part:

1. ORDERED that the portions of Plaintiff's complaint alleging that N.J.S.A. 13:20-28a(3) violates the federal and state constitutional guarantee of due process and equal protection of the law is hereby DISMISSED with prejudice..." (Annexed hereto as Exhibit A is a copy of the Order dated May 31, 2006).

Thus, neither the Order dated May 10, 2006 nor the Order dated May 31, 2006 purport to adjudicate the as applied claims for relief - viz., First Claim for Relief through Twelfth Claim for Relief, as well as the Sixty-Second through Sixty-Four Claims for Relief (67a to 69a; 80a). Therefore, there are numerous factual and legal issues remaining in this case. Accordingly, this appeal is interlocutory, as a matter of law.

Very truly yours,

S/_____

Elliott Louis Pell

cc: Barbara L. Conklin, Esq.
Bryant Gonzalez, Esq.

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
25 MARKET STREET
PO BOX 093
TRENTON, NJ 08625-0093
Phone: 609-633-8109 Fax: 609-984-9315
E-mail: Barbara.Conklin@dol.lps.state.nj.us

June 16, 2006

John M. Chacko, Clerk
Appellate Division
Superior Court of New Jersey
25 Market Street, R.J. Hughes Complex
P.O. Box 006
Trenton, New Jersey 08625

Re: Castle Rock Estates, LLC v. State of New Jersey, Township of WestMilford, et als.
Docket No.: Not Yet Assigned
Lower Court Dkt No.: PAS-L-003218-05

Dear Sir:

Please accept this reply by Defendant, State of New Jersey Department of Environmental Protection ("DEP") to Plaintiff's June 14 letter alleging its motion for leave to appeal is properly filed because "numerous factual and legal issues remain...in this case." Specifically, plaintiff claims that the lower court never ruled upon all of its 78

numbered "Claims for Relief" (Aa67-Aa83) and that, therefore, the appeal is interlocutory in nature.

However, plaintiff overlooks the fact that none of the five Trial Court Orders entered in this case disposed of any specific "Claim for Relief." Instead, these Orders adjudicate every factual and legal allegation contained in Plaintiff's Amended "Statement of the Case" (Aa32-Aa67). It is this "Statement of the Case" that contains all the alleged facts and legal defects plaintiff attributed to specific sections of the Highlands Act, Highlands Act regulations and attributed to Township Defendants' action on its development application. Plaintiff's "unaddressed claims" are part of a larger, improperly-pled laundry list of 78 legal conclusions regarding the Highlands Act in its entirety, N.J.S.A. 13:20-1 et seq., and the Highlands regulations in their entirety, N.J.A.C. 7:38-1 et seq. These blanket condemnations of the Act and its regulations are untethered to any specific fact as required by R. 4:5-2 and cannot be adjudicated. [1] Because of this, the parties did not brief or argue "Claims for Relief" nor did the Trial Court adjudicate them. Instead, the parties and the Court focused on the allegations and claims in Plaintiff's "Statement of the Case."

---

[1] The "Claims For Relief" that plaintiff alleges are unaddressed challenge the Highlands Act regulations, N.J.A.C. 7:38-1 et seq. Such challenges are not adjudicated in Law Division, but belong in the Appellate Division of Superior Court, pursuant to R. 2:2-3(a)(2).

In its "Statement of the Case" Plaintiff challenged N.J.S.A. 13:20-16, N.J.S.A. 13:20-17, N.J.S.A. 13:20-20, N.J.S.A. 13:20-25, N.J.S.A. 13:20-26, N.J.S.A. 13:20-28a(3), and N.J.S.A. 13:20-35 on

specific grounds (Aa47-Aa55; Aa59-Aa67); claimed the Act and the regulations "took" its property without just compensation (Aa65-Aa66); challenged Highlands regulations N.J.A.C. 7:38-3.5, N.J.A.C. 7:38-6.4 and N.J.A.C. 7:38-6.8 on specific grounds (Aa55-Aa59); and challenged actions by the Township defendants in connection with disposition of plaintiff's development application (Aa32-Aa47).

The challenge to N.J.A.C. 7:38-3.5, N.J.A.C. 7:38-6.4 and N.J.A.C. 7:38-6.8 and plaintiff's takings claim were dismissed by Order dated April 25, 2005 (Conklin Cert., June 16, 2006, Ex 1, attached).

Plaintiff's challenges to N.J.S.A. 13:20-16, N.J.S.A. 13:20-17, N.J.S.A. 13:20-20, N.J.S.A. 13:20-25, N.J.S.A. 13:20-26 and N.J.S.A. 13:20-35 were dismissed by Order dated May 10, 2006 (Aa8-Aa9).

Plaintiff's challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006 (Conklin Cert., June 13, 2006, Ex A).

And, finally, Plaintiff's challenge to the Township defendants' actions was dismissed by Order dated May 10, 2006. (Aa5-Aa7).

Since these Orders dispose of all the allegations and claims in the Amended Complaint, the Motion For Leave to Appeal is inappropriate and should be dismissed.

Lest the Court have any compunction about dismissing this motion, the record demonstrates that the broad-based "Claims for Relief" allegedly "unadjudicated" were, in fact, raised in the "Statement of the Case" concerning specific sections of the Highlands Act, and were dismissed by the Trial Court.

Plaintiff's First Claim for relief alleges the Act is an abuse of discretion (Aa67). That allegation appears in "Statement of the Case" Aa48/¶130; Aa50/¶141,¶145; Aa52/¶155; Aa54/¶168; Aa55/¶176,¶178; Aa59/¶194, ¶196; Aa60/¶204; Aa63/¶215. Plaintiff's facial challenge to N.J.S.A. 13:20-16, N.J.S.A. 13:20-17, N.J.S.A. 13:20-20, N.J.S.A. 13:20-25, N.J.S.A. 13:20-26 and N.J.S.A. 13:20-35 were dismissed by Order dated May 10, 2006 (Aa8-Aa9). Plaintiff's challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006 (Conklin Cert., June 13, 2006, Ex A).

The Second Claim for relief alleges the Act is not rationally related to desired ends (Aa67); that allegation appears in "Statement of the Case" Aa49/¶132; Aa50/¶144; Aa52/¶156; Aa56/¶181, ¶185; Aa59/¶193. Plaintiff's facial challenge to N.J.S.A. 13:20-16, N.J.S.A. 13:20-17, N.J.S.A. 13:20-20, N.J.S.A. 13:20-25, N.J.S.A. 13:20-26 and N.J.S.A. 13:20-35 were dismissed by Order dated

May 10, 2006 (Aa8-Aa9). Plaintiff's challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006 (Conklin Cert., June 13, 2006, Ex A).

The Third Claim for relief alleges that Act is arbitrary, unfair and unreasonable (Aa67); that allegation appears in "Statement of the Case" Aa49/¶133; Aa50/¶143,¶148; Aa52/¶157; Aa53/¶165; Aa54/¶169; Aa55/¶174; Aa55/¶179; Aa56/¶183; Aa58/¶191; Aa59/ ¶198; Aa61/¶205; and Aa63/¶216. Plaintiff's facial challenge to N.J.S.A. 13:20-16, N.J.S.A. 13:20-17, N.J.S.A. 13:20-20, N.J.S.A. 13:20-25, N.J.S.A. 13:20-26 and N.J.S.A. 13:20-35 were dismissed by Order dated May 10, 2006 (Aa8-Aa9). Plaintiff's challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006 (Conklin Cert., June 13, 2006, Ex A).

The Fourth Claim for relief alleges the Act is not rationally related to a Legitimate state interest (Aa68); that allegation appears in "Statement of the Case"Aa49/¶131;Aa50/¶142; Aa52/¶154; Aa54/¶170; Aa55/¶175,¶180;Aa56/¶184; Aa59/¶192; Aa61/¶206; and Aa63/¶217. Plaintiff's facial challenge to N.J.S.A. 13:20-16, N.J.S.A. 13:20-17, N.J.S.A. 13:20-20, N.J.S.A. 13:20-25, N.J.S.A. 13:20-26 and N.J.S.A. 13:20-35 were dismissed by Order dated May 10, 2006 (Aa8-Aa9). Plaintiff's challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006 (Conklin Cert., June 13, 2006, Ex A).

The Fifth Claim for relief alleges the Act deprives plaintiff of property without due process of law in violation of the federal constitution (Aa68); that

allegation appears in "Statement of the Case" Aa65-Aa66/¶235-¶243. Plaintiff's takings claims were dismissed on grounds of unripeness by Order dated April 25, 2006. (Conklin Cert., June 16, 2006, Exhibit 1). Plaintiff's federal due process challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006. (Conklin Cert., June 13, 2006, Ex. A).

The Sixth Claim for relief alleges the Act deprives plaintiff of property without due process of law in violation of the New Jersey constitution (Aa68); that allegation appears in "Statement of the Case" Aa65-Aa66/¶235-¶243. Plaintiff's takings claims were dismissed on grounds of unripeness by Order dated April 25, 2006. (Conklin Cert., June 16, 2006, Exhibit 1.) Plaintiff's state due process challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006. (Conklin Cert., June 13, 2006, Ex. A).

The Seventh Claim for relief alleges the Act deprives plaintiff of property in violation of the federal constitutional guarantee of equal protection of the law (Aa68); that same allegation appears in "Statement of the Case" Aa65-Aa66/¶235-¶243. Plaintiff's takings claims were dismissed on grounds of unripeness by Order dated April 25, 2006. (Conklin Cert., June 16, 2006, Exhibit 1.) Plaintiff's federal equal protection challenge to N.J.S.A. 13:20-28a(3) was dismissed by Order dated May 31, 2006. (Conklin Cert., June 13, 2006, Ex. A).

The Eighth Claim for relief alleges the Act deprives plaintiff of property in violation of New Jersey's constitutional guarantee of equal protection of the law (Aa68); that same allegation appears in "Statement of the Case" Aa65-Aa66/¶235-¶243.

Plaintiff's takings claims were dismissed on grounds of unripeness by Order dated April 25, 2006. (Conklin Cert., June 16, 2006, Exhibit 1.) Plaintiff's challenge to N.J.S.A. 13:20-28a(3) under the New Jersey guarantee of equal protection was dismissed by Order dated May 31, 2006. (Conklin Cert., June 13, 2006, Ex. A).

The Ninth Claim for relief alleges the Act "takes" plaintiff's property without just compensation in violation of the federal constitution (Aa68); that same allegation appears in "Statement of the Case" Aa65-Aa66/¶235-¶243. Plaintiff's takings claims were dismissed on grounds of unripeness by Order dated April 25, 2006. (Conklin Cert., June 16, 2006, Exhibit 1.)

The Tenth Claim for relief alleges the Act "takes" plaintiff's property without just compensation in violation of the New Jersey constitution (Aa69); that same allegation appears in "Statement of the Case" Aa65-Aa66/¶235-¶243. Again, plaintiff's takings claims were dismissed on grounds of unripeness by Order dated April 25, 2006. (Conklin Cert., June 16, 2006, Exhibit 1.)

The Eleventh Claim for relief alleges the Act is an unlawful ex post facto law in violation of federal law (Aa69); that same allegation appears in "Statement of the Case" Aa50/¶¶138-141. Plaintiff's challenge to N.J.S.A. 13:20-28a(3) on grounds of unlawful retroactivity was dismissed on May 31, 2006. Conklin Cert., June 13, 2006, Exhibit A.

The Twelfth Claim alleges the Act is an unlawful ex post facto law in violation of New Jersey law (Aa69); that same allegation appears in "Statement of the Case" Aa50/¶¶138-141. Again, plaintiff's challenge to N.J.S.A. 13:20-28a(3) on grounds of unlawful retroactivity was dismissed on May 31, 2006. Conklin Cert., June 13, 2006, Exhibit A.

The Sixty-Second Claim for relief alleges enforcement of the Act by John Doe I through V constitute a violation of 42 U.S.C. §1983 (Aa80). Since all the constitutional claims raised in plaintiff's "Statement of the Case" have been dismissed, there remains no federal civil rights claim to adjudicate.

The Sixty-Third Claim for relief alleges enforcement of the Act by John Doe I through V violate Plaintiff's State Constitutional rights (Aa80). Since plaintiff has not applied for a permit from NJDEP (Aa161-Aa162) and all plaintiff's facial and as applied challenges to the Act in the "Statement of the Case" have been dismissed, there is no "enforcement" of the Act to adjudicate.

The Sixty-Fourth Claim for relief alleges in applying the Act to the property, plaintiffs have failed to "turn square corners" with plaintiff (Aa80). The claim has been adjudicated since all plaintiff's claims in the "Statement of the Case" have been dismissed.

The foregoing record shows there is no truth to plaintiff's assertion that there are claims between the parties that remain for adjudication and that the motion for leave to appeal is appropriately before the court.

Alternatively, even if the Court determines that some "Claims For Relief" remain to be adjudicated, the motion should be denied. Plaintiff offers no factual or legal justification for this Court to accept this interlocutory appeal and interrupt the trial court proceedings to review disposition of a facial challenge to sections of the Highlands Act. The interest of justice neither requires it, nor will any irreparable harm come to plaintiff if the matter is returned to the trial court for disposition of the remainder of Plaintiff's claims.

Sincerely yours,

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY

By:_____
Barbara L. Conklin
Deputy Attorney General

c: Elliot Louis Pell, Esq.
Bryant Gonzalez, Esq.
Fred Semrau, Esq.

RECEIVED APPELLATE DIVISION:
JUNE 16, 2006
SUPERIOR COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-000639-05T1
MOTION NO. M -005561-05
BEFORE PART: O
JUDGE (S): PARKER .SAPP - PETERSON

CASTLE ROCK ESTATES LLC

vs

STATE OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL

MOTION FILED: May 30, 2006
ANSWER(S) FILED: June 13, 2006
By: CASTLE ROCK ESTATES
By: DEP
By: WEST MILFORD PLANNING BOARD
By: TWP. WEST MILFORD
SUBMITTED TO COURT: JULY 19, 2006

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 21st DAY OF JULY, 2006, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT:
FOR LEAVE TO APPEAL

GRANTED ( ) DENIED (xx) OTHER ( )

FOR THE COURT:

/S/_____
LORRAINE C. PARKER J.A.D.

I hereby certify that the forgoing is a true copy of the original on file in my office.

/S/_____
John M. Chacko
CLERK OF THE APPELLATE DIVISION

FILED: APPELLATE DIVISION JULY 31, 2006
JOHN M. CHACKO, CLERK